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Use of Force in Unsuccessful Arrests: *Torres v. Madrid* Tests Scope of Fourth Amendment Protections

Alexis O'Connor

Just before sunrise on July 15th, 2014, Ms. Roxanne Torres dropped off her friend and sat with the car running in a parking spot at her friend's apartment complex.¹ Unknown and unrelated to her, Albuquerque police officers sat in their unmarked cars nearby.² Police officers Janice Madrid and Richard Williamson, pursuing an arrest warrant for a different woman, approached the driver's side door of Ms. Torres's car.³ Ms. Torres, confused by the officers' shouting, believed that they were carjackers.⁴ As one officer fumbled with her door handle, Ms. Torres panicked and put the car in drive.⁵

When the car began to inch forward, the officers fired thirteen shots.⁶ Two of the thirteen bullets hit Ms. Torres in the back.⁷ The officers, positioned between Ms. Torres's driver's side door and the passenger door of the car parked beside it, asserted they feared for their lives.⁸ Wounded, Ms. Torres drove away, crashed her car, and stole another car before driving herself to an emergency room.⁹ The next day, officers arrested Ms. Torres for fleeing arrest, assaulting an officer, and stealing a car.¹⁰

¹ Petition for Writ of Certiorari at 5, *Torres v. Madrid*, No. 19-292 (filed Aug. 30, 2019); see also Brief of Petitioner at 4, *Torres v. Madrid*, No. 19-292 (filed Jan. 31, 2020).

² Brief of Petitioner, *supra* note 1, at 4; Brief of Respondents at 1, *Torres v. Madrid*, No. 19-292 (filed Mar. 2, 2020).

³ Brief of Petitioner, *supra* note 1, at 4; Brief of Respondents, *supra* note 2, at 1–2 (explaining that the arrest warrant was for a woman who the officers suspected of being part of an organized crime ring).

⁴ Brief of Petitioner, *supra* note 1, at 5 (noting the officers provided in their depositions that they did not identify themselves as officers); Brief of Respondents, *supra* note 2, at 3 (noting that Ms. Torres was under the influence of methamphetamines at the time of the incident).

⁵ Brief of Petitioner at 4–5 (providing that Ms. Torres testified she could not hear the officers' commands); Brief of Respondents at 1–2 (describing how Ms. Torres "freaked out" and "put the car into drive").

⁶ Petition for Writ of Certiorari, *supra* note 1, at 6; Brief of Petitioner, *supra* note 1, at 5.

⁷ Brief of Petitioner, *supra* note 1, at 5; Brief of Respondent, *supra* note 2, at 3.

⁸ Brief of Respondent, *supra* note 2, at 2–3 (summarizing the officers' recollection of fearing they may be hit by Ms. Torres's car); Brief of Petitioner at 5.

⁹ Petition for Writ of Certiorari, *supra* note 1, at 6. The bullet wounds caused disfigurement and scarring. *Id.* at 7.

¹⁰ Brief of Respondent, *supra* note 2, at 3–4.

In October 2016, Ms. Torres sued Officer Madrid and Officer Williamson for use of excessive force during the attempted arrest.¹¹ In response, the officers filed a motion for summary judgment asserting protection under qualified immunity.¹² The District Court of New Mexico granted the officers' motion on the grounds that Ms. Torres's Fourth Amendment rights had not been implicated since Ms. Torres continued to flee after being shot and had therefore not been seized by the officers.¹³ On appeal, the Tenth Circuit agreed with the District Court and held that Ms. Torres could not sue the officers for violating her Fourth Amendment rights because no seizure occurred.¹⁴

After granting Ms. Torres's request for reconsideration,¹⁵ the Supreme Court now faces a crucial question: can the Fourth Amendment protect people from an unreasonable use of force during an arrest if the arrest is unsuccessful?¹⁶

Excessive Force And Fourth Amendment Jurisprudence

The Fourth Amendment protects people from unreasonable searches and seizures by the government.¹⁷ In 1961, the Court explicitly recognized that this provision applied to state actors through the doctrine of incorporation.¹⁸ The Court incorporated the Fourth Amendment in *Mapp v. Ohio*, a case where officers conducted an aggressive and warrantless search of a single

¹¹ Torres v. Madrid, 769 Fed. Appx. 654, 656 (10th Cir. 2019).

¹² *Id.*

¹³ Torres v. Madrid, 769 Fed. Appx. 654, 656 (10th Cir. 2019).

¹⁴ *Id.* at 657; *see also* Brief of Respondent, *supra* note 2, at 5 (explaining that the Tenth Circuit affirmed the District Court's grant of summary judgment because Ms. Torres failed to show that her constitutional rights had been implicated, thus failing the first prong of the qualified immunity test).

¹⁵ Torres v. Madrid, 140 S. Ct. 680 (2019).

¹⁶ Brief of Respondent, *supra* note 2, at i ("Does the intentional application of physical force against a criminal suspect, by itself, constitute a 'seizure' within the meaning of the Fourth Amendment where the force itself does not result in the acquisition of physical control, possession, or custody of the suspect?"); *see also* Brief of Petitioner, *supra* note 1, at i ("Is an unsuccessful attempt to detain a suspect by use of physical force a 'seizure' within the meaning of the Fourth Amendment, as the Eighth, Ninth, and Eleventh Circuits and the New Mexico Supreme Court hold, or must physical force be successful in detaining a suspect to constitute a 'seizure,' as the Tenth Circuit and the D.C. Court of Appeals hold?").

¹⁷ U.S. CONST. amend. XIV § 1 (providing the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . .").

¹⁸ *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding the provision regarding Fourth Amendment searches and seizures also applied to state actors); *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 354 (1974).

mother's home.¹⁹ Invoking the need for judicial integrity, the Court held that the states were subject to the Fourth Amendment, which excludes evidence procured from an unreasonable search or seizure.²⁰

The Fourth Amendment's interpretation and application has long frustrated Supreme Court justices and legal academics alike.²¹ In particular, the courts increasingly grapple with the scope of Fourth Amendment protections against police use of excessive force.²² If an officer uses force to arrest a person, then the applied force is considered a seizure.²³ As a Fourth Amendment seizure, the applied force must be reasonable to be constitutional.²⁴ If the amount of force is excessive, or unreasonable, then the officer has committed a constitutional violation and may be liable for damages.²⁵ The officer may then be sued in federal court under the civil rights statute 1983 for violating a person's Fourth Amendment protection against the use of excessive force.²⁶

¹⁹ See *Mapp*, 367 U.S. at 644–45 (describing how officers presented Ms. Mapp with a paper they claimed was a warrant, but the prosecution neither produced nor explained the absence of the warrant at trial); see also *id.* (explaining that the officers originally alleged that Ms. Mapp was harboring a dangerous person, but ultimately arrested her for possession of obscene material). The Court described the officers' detainment of Ms. Mapp during the search as "running roughshod over [her]." See *id.* at 645.

²⁰ See *id.* at 659–60 ("Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence"); see also Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind. L.J. 329, 330 (1973) (explaining that the Court incorporated the exclusionary rule to prevent police misconduct and preserve judicial integrity).

²¹ See, e.g., Dworkin, *supra* note 20, at 329 ("The fourth amendment cases are a mess!"); see also Amsterdam, *supra* note 18, at 349–350.

²² See Andrew Chung et al., *Shielded: For Cops Who Kill, Special Supreme Court Protections*, Reuters (May 8, 2020 12 P.M.), <https://www.reuters.com/investigates/special-report/usa-police-immunity-sctus/> (summarizing an analysis of 252 appellate cases between 2015 and 2019 that demonstrated federal courts are increasingly ruling in favor of officers in excessive force cases and arguing that it is a result of recent Court decisions regarding qualified immunity).

²³ *Graham v. Connor*, 490 U.S. 386, 388 (1989) ("This case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person. We hold that such claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard rather than under a substantive due process standard.").

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *Monroe v. Pape*, 365 U.S. 167 (1961) (allowing a man to sue the Chicago Police Department for conducting a warrantless search of his home, acting violently toward his family during the search, and arresting him after the search); see also Rachel A. Harmon, *When is Police Violence Justified*, 102 NW. U. L. Rev. 1119, 1126 (2008).

The Court first articulated a test for determining the reasonableness of applied force in *Tennessee v. Garner*.²⁷ In *Garner*, an officer responding to a call about a potential prowler shot and killed an eighth grader trying to climb over a fence to flee police.²⁸ The Court determined that an officer is prohibited from using deadly force to prevent a person from escaping unless the officer has probable cause to believe a person posed a threat of death or physical injury to others.²⁹ Although *Garner* provided what appeared to be a bright-line rule for use of lethal force, it did not resolve the issue for any force less than lethal.³⁰ In terms of level of force allowed against fleeing individuals, the *Garner* Court only provided that courts must balance the individual's interests against the government.³¹

Four years after its decision in *Garner*, the Court confirmed that excessive force cases belonged strictly within the realm of Fourth Amendment jurisprudence and articulated a general standard for assessing police use of force.³² In *Graham v. Connor*, Mr. Graham sued the officers that arrested and injured him while he was having a diabetic attack.³³ The Court remanded the case with instruction to apply a balancing test that weighed the use of force's intrusion on a person's constitutional rights against the government's interests necessitating the use of force in light of the particular circumstances.³⁴ The Court then provided examples of circumstances that courts should consider: the severity of the crime; the level of immediate threat posed by the individual; and whether the person was resisting or attempting to evade arrest.³⁵ Finally, the Court

²⁷ *Tennessee v. Garner*, 471 U.S. 1 (1985).

²⁸ *Garner*, 471 U.S. at 3–4; see also Harmon, *supra* note 26, at 1128.

²⁹ *Garner*, 471 U.S. at 11 (“Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”); see also *id.* at 9 (“The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.”).

³⁰ See Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 NW. U. L. Rev. 1465, 1476 (2018); see also *Garner*, 471 U.S. at 20 (explaining that the issue is the use of lethal force against a dangerous individual rather than whether lethal force can be used against a person convicted of a felony or misdemeanor).

³¹ *Garner*, 471 U.S. at 7–8; see also Harmon, *supra* note 26, at 1128.

³² *Graham v. Connor*, 490 U.S. 386, 388 (1989); see also Harmon, *supra* note 26, at 1129 (“Whereas *Garner* addressed police uses of force, *Graham* described a general standard for evaluating police uses of force, and treated *Garner* as a particular application.”); see also Obasogie & Newman, *supra* note 30, at 1475.

³³ *Graham*, 490 U.S. at 388–89.

³⁴ *Graham*, 490 U.S. at 396.

³⁵ *Id.*

provided that courts should approach this analysis objectively and determine whether the use of force was reasonable in light of the facts and circumstances faced by the officers at the time.³⁶

Circuit Split: Whether an Unsuccessful Arrest Can Constitute a Seizure

Although the use of force during an arrest is considered a seizure for Fourth Amendment purposes, courts disagree over whether the arrest must be successful for the use force to even constitute a seizure.³⁷ Despite this disagreement among the circuit courts, more federal courts have determined that the Fourth Amendment applies even if an arrest is unsuccessful.³⁸ The Eighth Circuit determined that officers affect a seizure each time they apply physical force even when the arrest is unsuccessful.³⁹ In *Ludwig v. Anderson*, the Eighth Circuit determined that officers had seized an “emotionally disturbed” man twice during an attempted arrest for Fourth Amendment purposes: once when an officer hit Mr. Ludwig with a squad car and again when the officers shot and killed Mr. Ludwig.⁴⁰

In a case that is factually similar to *Torres v. Madrid*, the Eleventh Circuit held that an officer applies force subject to Fourth Amendment protections whenever he shoots a person and the bullet strikes or contacts that person.⁴¹ In *Carr v. Tantangelo*, the Eleventh Circuit determined that an officer had seized a man when he shot him in the stomach even though the man temporarily ran away from the officers before being arrested.⁴² The Ninth Circuit has also held

³⁶ *Graham*, 490 U.S. at 397; see also *Obasogie & Newman*, *supra* note 30, at 1477 (“[T]he Court solidified the Fourth Amendment ‘objective reasonableness’ as the only way to evaluate police excessive force in the context of effectuating an arrest, while avoiding creating any bright-line rules to actually guide officers in using force.”).

³⁷ See, e.g., Petition for Writ of Certiorari, *supra* note 1, at 2 (listing the Eighth, Ninth, and Eleventh Circuits and the New Mexico Supreme Court as authorities holding that an unsuccessful use of force is a Fourth Amendment seizure).

³⁸ See, e.g., Petition for Writ of Certiorari, *supra* note 1, at 14 (listing the Eighth, Ninth, and Eleventh Circuits and the New Mexico Supreme Court as authorities holding that an unsuccessful use of force is a Fourth Amendment seizure).

³⁹ *Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995). Although a seizure is ‘effected by the slightest application of physical force’ despite later escape, that seizure does not continue during ‘periods of fugitivity.’ Thus, in determining the issue of Fourth Amendment reasonableness, the district court should scrutinize only the seizure or seizures themselves, not the events leading to them. In doing so, *Hodari D.* instructs that many different seizures may occur during a single series of events. *Id.* at 471 (internal citations omitted).

⁴⁰ *Id.*

⁴¹ *Carr v. Tantangelo*, 338 F.3d 1259, 1268 (11th Cir. 2003).

⁴² *Id.* at 1262–66; 1268.

that the Fourth Amendment protects individuals from unsuccessful use of excessive force.⁴³

However, other courts have determined that the Fourth Amendment does not apply where an arrest is unsuccessful.⁴⁴ In this case and others, the Tenth Circuit holds that the Fourth Amendment does not apply to unsuccessful uses of force.⁴⁵ Additionally, the D.C. Circuit Court of Appeals does not provide Fourth Amendment protections to unsuccessful uses of force.⁴⁶

Torres v. Madrid

In 2019, the Tenth Circuit Court of Appeals granted *de novo* review and affirmed the District Court's ruling in favor of the officers' motion for summary judgment.⁴⁷ Afterwards, Ms. Torres filed a writ of certiorari requesting the Court to reconsider the Tenth Circuit's ruling against her.⁴⁸ The Supreme Court granted Ms. Torres's petition for writ of certiorari on Dec. 18th, 2019.⁴⁹

In her brief for the Court, Ms. Torres argued that the Framers intended to include common-law arrests under the Fourth Amendment's definition of a seizure.⁵⁰ Since common-law arrests did not turn on whether a person escaped, a Fourth Amendment seizure can still occur even if the arrest is initially unsuccessful.⁵¹ Additionally, Ms. Torres argued that Court precedent supports finding that a Fourth Amendment seizure occurs when an officer's bullet makes contact with the intended target.⁵² In particular, Ms. Torres relied on precedent set by the Court in *California v. Hodari D.* that any application of force

⁴³ See *Nelson v. City of Davis*, 685 F.3d 867, 873–74 (9th Cir. 2012); see also *Ceyala v. Toth*, No. CV 17-529-TUC-DCB (LAB), 2020 U.S. Dist. LEXIS 39427 (D. Ariz. Mar. 5, 2020).

⁴⁴ Petition for Writ of Certiorari at 2, *Torres v. Madrid*, No. 19-292 (argued on Oct. 14, 2020) (listing the Tenth Circuit and the D.C. Court of Appeals as authorities holding that the use of force must be successful to be a Fourth Amendment seizure).

⁴⁵ *Torres v. Madrid*, 769 Fed. Appx. 654, 655 (10th Cir. 2019); see also *Brooks v. Gaenzle*, 614 F.3d 1213, 1219 (10th Cir. 2010).

⁴⁶ See, e.g., *Henson v. United States*, 55 A.3d 859, 862–63 (D.C. 2012).

⁴⁷ *Torres v. Madrid*, 769 Fed. Appx. 654, 655 (10th Cir. 2019).

⁴⁸ Petition for Writ of Certiorari, *supra* note 1.

⁴⁹ *Torres v. Madrid*, 140 S. Ct. 680 (2019).

⁵⁰ Brief of Petitioner, *supra* note 1, at 16–17.

⁵¹ *Id.* at 14.

⁵² *Id.* at 25.

intended to restrain movement constitutes a seizure.⁵³ Numerous organizations, including the ACLU, NAACP, and the Cato Institute, filed amici briefs in support of Ms. Torres and agree that Fourth Amendment protections do not turn on whether the officer's use of force affected an arrest.⁵⁴

In opposition, Officers Madrid and Williamson argued that the historical and common-sense understanding of the word "seizure" requires the officer to have acquired control over the individual to constitute a Fourth Amendment seizure.⁵⁵ Since the officers did not acquire control over Ms. Torres when they shot her twice, there was no seizure.⁵⁶ Under this theory, since the shooting did not affect a seizure, it did not implicate Fourth Amendment protections.⁵⁷ Finally, the officers argued that the Court's commentary that Ms. Torres relied on in *Hodari D.* is merely dicta and does not bind this case's outcome.⁵⁸ Instead, the officers relied on precedent set by *Brower*.⁵⁹ Organizations including the National Association of Counties, National League of Cities, and National Sheriff's Association have contributed to amici briefs in support of the officers.⁶⁰

Conclusion

The Court's decision in *Torres v. Madrid* is expected by July 2021.⁶¹ As it stands, the Court appears to be evenly split on the issue with all but two justices hinting at their disposition on the case during oral argument in Oct.

⁵³ *Id.*; see *California v. Hodari D.*, 499 U.S. 621, 626 (1991) ("The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful.").

⁵⁴ See Brief for the American Civil Liberties Union & the ACLU of New Mexico et al. as Amici Curiae Supporting Petitioner, *Torres v. Madrid*, No. 19-292 (filed Feb. 7, 2020); see also Brief for the American Association for Justice & Cato Institute et al. as Amici Curiae Supporting Petitioner, *Torres v. Madrid*, No. 19-292 (filed Feb. 7, 2020).

⁵⁵ Brief of Respondent, *supra* note 2, at 12–15.

⁵⁶ *Id.* at 5–6; 16–19.

⁵⁷ *Id.*

⁵⁸ Brief of Respondent, *supra* note 2 at 25.

⁵⁹ *Id.* at 28–32; see also *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) ("Violation of the Fourth Amendment requires an intentional acquisition of physical control.").

⁶⁰ See, e.g., Nat'l Assoc. of Counties & Nat'l League of Cities et al. as Amici Curiae Supporting Respondents, *Torres v. Madrid*, No. 19-292 (filed Mar. 9, 2020).

⁶¹ John Kruzel, *Supreme Court Wades into Legal Gray Zone Around Police Shootings*, The Hill (Oct. 14, 2020 11:23 AM), <https://thehill.com/regulation/court-battles/520983-supreme-court-wades-into-legal-gray-zone-around-police-shootings>.

2020.⁶² Chief Justice John Roberts and Justice Kavanaugh have not indicated their leanings, but civil rights advocates are already voicing concern over the potential implications this ruling will hold for the future of Fourth Amendment protections.⁶³ In the shadow of the civil rights movement that swelled during the summer of 2020, the Court's decision is poised to tip the balance in favor of either officers or civilians.⁶⁴

⁶² See Jeffrey Bellin, *Argument Analysis: Justices Spar Over Stare Decisis, Originalism, Text, and What Counts as a Fourth Amendment 'Seizure'*, SCOTUSBLOG (Oct. 16, 2020 3:08 PM), <https://www.scotusblog.com/2020/10/argument-analysis-justices-spar-over-stare-decisis-originalism-text-and-what-counts-as-a-fourth-amendment-seizure/>.

⁶³ See Bellin, *supra* note 62; see also Adam Liptak, *A Timely Case on Police Violence at the Supreme Court*, N.Y. TIMES (July 20, 2020), <https://www.nytimes.com/2020/07/20/us/politics/supreme-court-police-brutality.html>.

⁶⁴ See Liptak, *supra* note 63. The case, originally scheduled for argument in March 2020, was postponed until October 2020 because of the COVID-19 pandemic. See Bellin, *supra* note 62.